

(7)

Office - Supreme Court
FILED
MAY 29 1943
CLERK OF THE COURT

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

FORREST SMITH, State Auditor of the
State of Missouri, *Petitioner*,

vs.

AMERICAN BRIDGE COMPANY, a
Corporation.

No. 

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF MISSOURI.

ROY McKITTRICK,
Attorney-General of Missouri,

J. W. THURMAN,
TYRE W. BURTON,
Jefferson City, Mo.

D. A. THOMPSON,
Kansas City, Mo.

WM. G. MARBURY,
St. Louis, Mo.

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

FORREST SMITH, State Auditor of the
State of Missouri, *Petitioner*,

vs.

AMERICAN BRIDGE COMPANY, a
Corporation.

} No. _____

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.**

ROY McKITTRICK,

Attorney-General of Missouri,

J. W. THURMAN,

TYRE W. BURTON,

Jefferson City, Mo.

D. A. THOMPSON,

Kansas City, Mo.

WM. G. MARBURY,

St. Louis, Mo.

Counsel for Petitioner.



INDEX

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Statement of basis of jurisdiction of this Court	5
Statement of question presented	6
The stage of proceedings, court in which and the manner in which the Federal question sought to be reviewed was raised	6
Statement of reasons relied on for allowance of writ	8
Summary of argument	11
I. The Supreme Court of Missouri in its opinion held that Section 11409 of the Missouri Sales Tax Act, Laws of Missouri 1941, page 698 to 714, exempts from the provisions of said act all sales at retail in sales transactions in interstate com- merce and that the classification of such sales was reason- able and not in violation of the equal protection clause of the 14th Amendment to the Federal Constitution	11
(a) The Missouri Supreme Court held that the classifica- tion of retail sales included in Section 11409 is reason- able	11
(b) Same rule must be used for taxing foreign corporations as is used for domestic corporations for the same privilege	11
(c) The exemption section as construed by the Missouri Supreme Court would deny equal protection to the laws to the retailer dealing only in intrastate trans- actions	11
(d) The Missouri Legislature acted beyond its authority in exempting retail sales transactions in interstate commerce from the provisions of the Sales Tax Act . . .	11
(e) The equal protection clause applies to retailers in intrastate commerce as well as to retailers in inter- state commerce	11
(f) The classification of sales at retail in the sales trans- actions of interstate commerce is not reasonable	11
II. Stage in proceedings in the court of first instance and appel- late court at which and the manner in which the Federal question sought to be reviewed was raised	11
Argument	12
Conclusion	30

Table of Cases Cited.

Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U. S. 673, 73 L. Ed. 1107, 50 Sup. Ct. 451, 453.....	8
Colgate v. Harvey, 296 U. S. 404, 56 Sup. Ct. 252, 260, 80 L. Ed. 299, 102 A. L. R. 54.....	22
Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817.....	14
Frost v. Corporation Commission of State of Oklahoma, 278 U. S. 515, 73 L. Ed. 483, 49 Sup. Ct. 235.....	14
Gwin et al. v. Henneford, 203 U. S. 434, 83 L. Ed. 272, 59 Sup. Ct. 325.....	19
Herndon v. State of Georgia, 295 U. S. 441, 55 Sup. Ct. 794, 795....	28
Home Insurance Company et al. v. Dick et al., 281 U. S. 397, 74 L. Ed. 926, 74 A. L. R. 701, 50 Sup. Ct. 338.....	28
Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 72 L. Ed. 770, 48 Sup. Ct. 423.....	21
Madden v. Commonwealth of Kentucky et al., 209 U. S. 83, 60 Sup. Ct. 406.....	23
McCarroll v. Dixie Greyhound Lines, 209 U. S. 176, 189, 60 Sup. Ct. 504, 510, 84 L. Ed. 683.....	17
Ozark Pipe Line Corporation v. Monier et al., 266 U. S. 555, 69 L. Ed. 439, 45 Sup. Ct. 184.....	19
Southern Railway Company v. Greene, 216 U. S. 400, 54 L. Ed. 536, 30 Sup. Ct. 287, 291 and Vol. II Am. Jur. 95, Sec. 108.....	14
Scott v. Donald, 165 U. S. 98.....	20
Spector Motor Service v. Walsh, 139 Fed. (2nd) 809, 816.....	16
State v. Distilling Co., 139 S. W. 453, 236 Mo. 219.....	20

Statutes Cited.

Section 11408, Laws of Missouri 1941, Page 701.....	2
Section 11409, Laws of Missouri 1941, Page 702.....	3

Constitutional Provisions.

Section 1 of the 14th Amendment of the Constitution of the United States.....	8
---	---

Rules of Court.

Rule 38 of the rules of this Court, Par. 5.....	5
---	---

Texts Cited.

12 Am. Jur., Page 235, Sec. 537.....	15
--------------------------------------	----

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

FORREST SMITH, State Auditor of the
State of Missouri, *Petitioner*,
vs.
AMERICAN BRIDGE COMPANY, a
Corporation.

No. _____

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF MISSOURI.**

To the Honorable Harlan F. Stone, Chief Justice, and the
Honorable Associate Justices, of the Supreme Court
of the United States:

The petitioner, State Auditor of the State of Missouri,
respectfully petitions that a Writ of Certiorari be issued
in this cause to the Supreme Court of Missouri, and in sup-
port thereof, respectfully submits the following matter:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This petition is filed to obtain a review of a final judg-
ment of the Supreme Court of the State of Missouri, dated
April 3, 1944, opinion filed February 7, 1944, in the case
of American Bridge Company, a corporation, vs. Forrest
Smith, State Auditor of the State of Missouri. 179 S. W. 2d
12. The case was submitted to Division 1, of the Supreme
Court of Missouri, which wrote the opinion submitted in
the record herewith. (R. folio 80-90.)

Motion for rehearing was denied and on April 3, 1944, petitioner's motion to transfer the cause to Court en Banc was overruled. By that opinion the court held that the exemption section of the Missouri Sales Tax Act (Section 11409, R. S. 1939 as amended, Laws 1941, pages 698 to 714 exempts from the Missouri Sales Tax Act all sales at retail of tangible personal property, in sales transactions of interstate commerce.

The case originated in the Circuit Court of Cole County, Missouri, where a petition under the Missouri declaratory judgment law was filed by the American Bridge Company, a corporation, against the petitioner herein, alleging that it was a foreign corporation engaged in the business or occupation of fabricating and selling structural steels, which is manufactured and produced in various places outside the State of Missouri, to customers for use or consumption within the State of Missouri; that such sales were transactions in interstate commerce and by the terms of said Section 11409 of the said Missouri Retail Sales Tax Act were not taxable; praying for an order restraining petitioner from collecting the tax and for an adjudication by the court determining the taxability of said transactions, and of the rights and liabilities of said company with respect to payment and exemption from the tax.

The trial court made findings of fact, conclusions of law and entered a decree in favor of petitioner herein. (R. 56-61 Mo. Supreme Court Record).

The said American Bridge Company appealed to the Missouri Supreme Court and the case was submitted to Division 1 of that court at the September 1943 Term thereof, which court on the 7th day of February 1944, rendered an opinion holding that the transactions involved in the

case were transactions in interstate commerce and that by virtue of the provisions of Section 11409 R. S. 1939 as amended, Laws of Missouri 1941, pages 698 to 714, l. c. 702 were exempt from the said Missouri Sales Tax Act.

The Missouri Supreme Court in said opinion held that said section 11409 was a reasonable classification (R. folio 88), of retail sales and that by it all sales at retail of tangible personal property in sales transactions of interstate commerce were exempt from the Missouri Sales Tax Act.

The facts involved in this case and upon which the Supreme Court based its decision and judgment are not in dispute and are set forth in the opinion of the court. (R. folio 82.)

It was conceded by all parties and found by the Supreme Court of Missouri, that the transactions here involved were in interstate commerce and that the only question involved was whether or not such transactions were exempted from the Missouri Sales Tax Act by virtue of the provisions of said exemption section number 11409, Laws of Missouri 1941, pages 698 to 714, the pertinent portion of which reads as follows:

"There is hereby specifically exempted from the provisions of this article and from the computation of the tax levied, assessed or payable under this article such retail sales as may be made in commerce between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible personal property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state."

The pertinent portions of Section 11408, Laws of Missouri 1941, which petitioner claims to impose a tax on the transactions herein involved is as follows: (Laws of Missouri 1941, Page 701, Section 11408).

"From and after the effective date of this article and up to and including December 31, 1943, there shall be and is hereby levied and imposed and there shall be collected and paid:

Upon every retail sale in this State of tangible personal property a tax equivalent to two (2%) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2%) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange.*****"

The tax involved in this action is 2% of the proceeds derived by the American Bridge Company from sales of tangible personal property to purchasers in Missouri for use and consumption in Missouri.

The position taken by each of the parties with respect to the application of said exemption Section 11409 Laws of Missouri 1941, pages 698 to 714 is as follows:

The petitioner took the position that this section only exempted from the provisions of said Sales Tax Act; (a) such retail sales as may be made between the State of Missouri and any other state of the United States which the State of Missouri is prohibited from taxing under the constitution or laws of the state; (b) any retail sale that the State of Missouri is prohibited from taxing under the constitution or laws of the United States of America, and that a construction of this section giving a blanket exemption to such retail sales would render the section uncon-

stitutional because it would unreasonably discriminate against retailers in Missouri who only dealt in intrastate retail sales transactions and in favor of retailers in Missouri who only dealt in interstate retail sales transactions.

The American Bridge Company took the position that the said section is a blanket exemption for all sales at retail in sales transactions in interstate commerce.

The Missouri Supreme Court in the aforesaid opinion sustained the position of the American Bridge Company and held that the classification was reasonable.

The petitioner in his motion for rehearing and motion to transfer to Court en Banc contended that said section as construed by the Missouri Supreme Court was unconstitutional in that it was an unreasonable classification of retail sales in this state and therefore was in violation of the equal protection clause of the 14th Amendment to the Federal Constitution.

The opinion of the Supreme Court of Missouri held that the classification of said retail sales in interstate commerce created by this exemption section is reasonable and it is this portion of the opinion which the petitioner seeks to have reviewed by this Honorable Court.

STATEMENT OF BASIS OF JURISDICTION OF THIS COURT.

The statutory provision which it is believed sustains the jurisdiction of this court is Section 237B of the Federal Judicial Code (28 U. S. C. A. Section 344 (b)).

Petitioner also relies on Rule 38 of the Rules of this Court, and particularly on Paragraph 5 thereof.

The date of the decree to be reviewed is April 3, 1944 (date motion to transfer to Court en Banc was overruled)

and the opinion of the Supreme Court of Missouri is attached to the printed record to be furnished with this application for Writ of Certiorari. (R. folio 80-90.)

STATEMENT OF QUESTION PRESENTED.

The sole question presented in this case is whether or not Section 11409 of the Missouri Sales Tax Act, Laws of Missouri 1941, pages 698 to 714, as construed by the Missouri Supreme Court creates an unreasonable classification of retail sales and therefore violates the equal protection clause of the 14th Amendment to the Federal Constitution of the United States.

THE STAGE OF PROCEEDINGS, COURT IN WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

The constitutionality of said exemption section Number 11409, Laws of Missouri 1941, page 702, was raised by petitioner in Sections 6 to 9, in his motion for rehearing of the opinion rendered by the Missouri Supreme Court (R. folio 95-96) the pertinent portion of which is as follows: (R. folio 87-88)

"The strict construction of the exemption section should not force the conclusion that the legislature intended other than that which it expressed in plain language, if the exemption as expressed in plain language is reasonable. The legislature did not express an intention that only retail sales in interstate commerce transactions which infringe the Commerce Clause should be exempted, and to so construe the section would greatly limit the embrace of the exemption.

"It must be conceded that the Sales Tax Act, if applicable to the sales in controversy, does not aim at, or discriminate against interstate commerce, and imposes the same burden upon the sales in controversy as is imposed upon sales in intrastate commerce. To construe the exemption section to include sales of tangible personal property in which the transfer of ownership, or title to, the property occurs after the property has come to its destination in this state, would exempt *sales at retail* in the state with resultant loss of revenue, although the personalty so sold, being at the end of its journey within Missouri was consequently receiving the protection of the state's laws. And a construction of the exemption section which would exempt sales in interstate commerce which the state may otherwise tax—the purchasers of goods from sellers in intrastate commerce being required to pay the sales tax, and purchasers of sales in interstate commerce (otherwise taxable) not being obliged to pay—would place sellers in intrastate commerce in a position of competitive disadvantage. Of such a tax, although imposed upon a taxable event an integral part of a transaction of interstate commerce, it is now written that the burden of such a tax upon interstate commerce is merely incidental or consequential. However, we have found it no where written that such a tax does not burden interstate commerce. We may assert that there are reasonable men who believe such a tax subversive to the freedom of commercial intercourse among the states, tending to deprive purchasers and customers of one nation of the free enjoyment of the markets of the nation. We are herein interested in the latter view only insofar as it may tend to justify the exemption expressed by plain language in the section as a reasonable one.

"If it was the intention of the legislature to exempt, from the provisions of the Sales Tax Act, retail sales in the transactions of interstate commerce, since such exemption is reasonable, it cannot be successfully

urged that the application of the exemption to the sales in controversy is invalid because apparently unjust in that it would place sellers in intrastate commerce in a position of competitive disadvantage."

The petitioner in his motion for rehearing and motion to transfer to Court en Banc contended that such a construction placed on said section by the Missouri Supreme Court, rendered it unconstitutional and void because it arbitrarily and unreasonably classified retail sales transactions in interstate commerce in an exempt class from retail sales transactions in intrastate commerce, contrary to the equal protection clause of the 14th Amendment to the Federal Constitution of the United States, which motions for rehearing and transfer to Court en Banc were overruled by said Supreme Court.

The petitioner under the rule announced by this court in the case of Brinkerhoff-Farris Trust & Savings Company vs. Hill 281 U. S. 673; 73 L. Ed. 1107; 50 Sup. Court 451, 453; in his motion for rehearing and in his motion to transfer to Court en Banc, contended that the constitutionality of said exemption section first came into the case when the Missouri Supreme Court in its opinion ruled that the classification of retail sales made by this section is reasonable.

STATEMENT OF REASONS RELIED ON FOR ALLOW- ANCE OF WRIT.

I.

1. The decision of the Supreme Court of Missouri is upon an important question of Federal Law which has not been directly passed upon by this court.

2. The decision of the Missouri Supreme Court is probably not in accord with applicable decisions of this court.

3. The question is frequently presented in the administration by the State Auditor of Missouri of the Missouri Sales Tax Act under consideration, and is similarly presented in the administration of acts in numerous states where excise tax laws have been enacted.

4. The decision of the Missouri Supreme Court is in conflict with principles established by prior decisions of this court.

5. By the language of the opinion hereinbefore set out the petitioner submits that the Missouri Supreme Court ruled that said exemption section exempting from the Missouri Sales Tax Act all sales at retail in sales transactions of interstate commerce was reasonable and not in violation of the equal protection clause of the 14th Amendment to the Federal Constitution of the United States.

WHEREFORE, Your petitioner pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, commanding that Court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 38677, September Term 1943, American Bridge Company, a corporation, Appellant, vs. Forrest Smith, State Auditor of the State of Missouri, Respondent, and that the said judgment of the Supreme Court of Missouri may be reversed by this Honorable Court, and

that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

ROY McKITTRICK,
Attorney-General,

TYRE W. BURTON,
J. W. THURMAN,
D. A. THOMPSON,
WM. G. MARBURY,
Counsel for Petitioner.

SUMMARY OF ARGUMENT.

I.

The Supreme Court of Missouri in its opinion held that Section 11409 of the Missouri Sales Tax Act, Laws of Missouri 1941, pages 698 to 714, exempts from the provisions of said act all sales at retail in sales transactions in interstate commerce and that the classification of such sales was reasonable and not in violation of the equal protection clause of the 14th Amendment to the Federal Constitution.

- (a) The Missouri Supreme Court held that the classification of retail sales included in Section 11409 is reasonable.
- (b) Same rule must be used for taxing foreign corporations as is used for domestic corporations for the same privilege.
- (c) The exemption section as construed by the Missouri Supreme Court would deny equal protection of the laws to the retailer dealing only in intrastate transactions.
- (d) The Missouri Legislature acted beyond its authority in exempting retail sales transactions in interstate commerce from the provisions of the Sales Tax Act.
- (e) The equal protection clause applies to retailers in intrastate commerce as well as to retailers in interstate commerce.
- (f) The classification of sales at retail in the sales transactions of interstate commerce is not reasonable.

II.

Stage in proceedings in the court of first instance and appellate court at which and the manner in which the Federal question sought to be reviewed was raised.

ARGUMENT.

THE MISSOURI SUPREME COURT HELD THAT THE CLASSIFICATION OF RETAIL SALES INCLUDED IN SECTION 11409 IS REASONABLE.

I.

(a) The Missouri Supreme Court in its opinion in this case (Missouri Opinion February 7, 1944) held that the Missouri Sales Tax Act Laws of Missouri 1941, pages 698-714, by section 11409 thereof exempts from the provisions of the Act all sales at retail in sales transactions in interstate commerce, and that the classification of such retail sales was reasonable and not in violation of the equal protection clause of the 14th Amendment to the Federal Constitution.

The portion of the opinion in which the court considered and ruled on the constitutionality of the exemption section is as follows: (R. folio 87-88)

"The strict construction of the exemption section should not force the conclusion that the legislature intended other than that which it expressed in plain language, if the exemption as expressed in plain language is reasonable. The legislature did not express an intention that only retail sales in interstate commerce transactions which infringe the Commerce Clause should be exempted, and to so construe the section would greatly limit the embrace of the exemption.

"It must be conceded that the Sales Tax Act, if applicable to the sales in controversy, does not aim at, or discriminate against interstate commerce, and imposes the same burden upon the sales in controversy

as is imposed upon sales in intrastate commerce. To construe the exemption section to include sales of tangible personal property in which the transfer of ownership, or title to, the property occurs after the property has come to its destination in this state, would exempt *sales at retail* in the state with resultant loss of revenue, although the personalty so sold, being at the end of its journey within Missouri was consequently receiving the protection of the state's laws. And a construction of the exemption section which would exempt sales in interstate commerce which the state may otherwise tax the purchasers of goods from sellers in intrastate commerce being required to pay the sales tax, and purchasers of sales in interstate commerce (otherwise taxable) not being obliged to pay—would place sellers in intrastate commerce in a position of competitive disadvantage. Of such a tax, although imposed upon a taxable event an integral part of a transaction of interstate commerce, it is now written that the burden of such a tax upon interstate commerce is merely incidental or consequential. However, we have found it no where written that such a tax does not burden interstate commerce. We may assert that there are reasonable men who believe such a tax subversive to the freedom of commercial intercourse among the states, tending to deprive purchasers and customers of one nation of the free enjoyment of the markets of the nation. We are herein interested in the latter view only insofar as it may tend to justify the exemption expressed by plain language in the section as a reasonable one.

"If it was the intention of the legislature to exempt, from the provisions of the Sales Tax Act, retail sales in the transactions of interstate commerce, since such exemption is reasonable, it cannot be successfully urged that the application of the exemption to the sales in controversy is invalid because apparently unjust in that it would place sellers in intrastate commerce in a position of competitive disadvantage."

The petitioner in his brief to the Missouri Supreme Court, in support of his contention that the section would be in violation of the equal protection clause of the 14th Amendment to the Federal Constitution, if given a construction such as the one which the Missouri Supreme Court placed on it, cited *Erie R. R. Company v. Tompkins* 304 U. S. 64, 72 L. Ed. 1188, 58 S. Ct. 817; *Frost v. Corporation Commission of State of Oklahoma* 278 U. S. 515, 73 L. Ed. 483, 49 S. Ct. 235; *Southern Railway Company v. Greene* 216 U. S. 400, 54 L. Ed. 536, 30 S. Ct. 287, 291 and Vol. 11 Am. Jur. 95 Sec. 108; *Gwin et al v. Henneford* 305 U. S. 434, 83 L. Ed. 272, 59 S. Ct. 325.

SAME RULE MUST BE USED FOR TAXING FOREIGN
CORPORATIONS AS IS USED FOR DOMESTIC CORPO-
RATIONS FOR THE SAME PRIVILEGE.

(b) The authorities cited, *supra*, apply the principle that foreign corporations may not be taxed for carrying on a business by a different and more onerous rule than is used in taxing domestic corporations for the same privilege, because such a tax would be a denial of the equal protection of the laws.

In *Southern Railway Company v. Greene*, *supra*, Mr. Justice Day in delivering the opinion of the court, said l. c. 291.

“While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.”

The same principle applies to persons as to corporations. *Southern R. R. Company v. Greene, supra.*

THE EXEMPTION SECTION AS CONSTRUED BY THE MISSOURI SUPREME COURT WOULD DENY EQUAL PROTECTION OF THE LAWS TO THE RETAILER DEALING ONLY IN INTRASTATE TRANSACTION.

(c) The part of the opinion of the Missouri Supreme Court which held that the exemption section exempts all sales at retail in sales transactions of interstate commerce is as follows:

"The failure of the legislature to enact a general compensating use tax, and the failure of the legislature to amend by expressly restricting the exemption section to exempt only retail sales in interstate commerce which infringe the Commerce Clause, lend support to our conclusion *that the legislature intended that the section should exempt all sales at retail in the sales transactions of interstate commerce.*" (*Emphasis ours.*)

In *Southern Railway Company v. Greene, supra*, l. c. 289, the court said:

"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama within the meaning of the 14th Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

Also in 12 Am. Jur. Page 235 Sec. 537, the rule is stated that

"A statute which discriminates unjustly against residents in favor of nonresidents violates the equal protection clause."

The Retail Sales Tax Act imposes a tax of 2% of the sale price of certain tangible personal property sold at retail for use and consumption in the state and requires the retailer to collect the tax from the purchaser and report and pay same to the State Auditor.

Under the construction by the Missouri Supreme Court placed on Section 11409, the retailer who makes sales transactions in which interstate commerce is involved does not come within the provisions of the Act, while the retailer who sells the same kind of articles and under same conditions, except his sales are intrastate transactions, must collect and pay the tax. The result of such a classification is to give the retailer in interstate transactions a margin of 2% advantage over the retailer in intrastate transactions.

**THE MISSOURI LEGISLATURE ACTED BEYOND ITS
AUTHORITY IN EXEMPTING RETAIL SALES
TRANSACTIONS IN INTERSTATE COMMERCE
FROM THE PROVISIONS OF THE SALES TAX ACT.**

(d) It is the contention of the petitioner that the Missouri Sales Tax Act without the provisions of the exemption section 11409 is limited in its scope to sales transactions in interstate commerce by the provisions of the Federal Constitution and that any attempt by the Legislature to extend the scope of the tax beyond the limits prescribed by the Federal Constitution is unauthorized.

In the case of *Spector Motor Service v. Walsh*, 139 Fed (2nd) 809, 816 Cirucit Judge Clark of the Circuit Court of Appeals of the Second Circuit in treating this subject quoted the dissent of Mr. Justice Black in *Gwin, White & Prince v. Henneford*, *supra*, as follows:

"I would return to the rule that except for state acts designed to impose discriminatory burdens on interstate commerce because it is interstate—Congress alone must determine how far (interstate commerce) shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited. (*Welton v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347.) By 1940, Mr. Justice Black had been joined by Justices Douglas and Frankfurter in dissent in *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 189, 60 S. Ct. 504, 510, 84 L. Ed. 683, where they said: Unconfined by the "narrow scope of judicial proceedings Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union."

It will be noted from the foregoing that Congress alone must determine how far interstate commerce shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited. It will also be noted from the foregoing that Mr. Justice Douglas and Mr. Justice Frankfurter joined in this view in *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176, 189, 60 S. Ct. 504, 510, 84 L. Ed. 683.

If this is the rule then the Missouri Legislature was without authority in attempting by the exemption section to exempt retail sales transactions in interstate commerce from the provisions of the Act because that is a power which Congress alone may exercise.

In *Spector Motor Service v. Walsh*, *supra*, the Circuit Court of Appeals of the Second Circuit held that a Con-

necticut Corporation Business Tax which imposed a tax on the privilege of doing a business within that state measured by net income, was applicable to allocated local business of foreign motor carrier whose entire business was in interstate commerce but which had qualified to do business in that state and maintained terminals there.

In discussing the discriminatory features of this Act, the court at l. c. 817 said:

"Here this tax certainly cannot be considered discriminatory. It is levied on all corporations carrying on business within the state, local corporations paying at the same rate as foreign ones, and with most careful provisions for the ascertainment of only income produced within the state. Indeed, if we should strike down the tax against plaintiff, we would be discriminating against intrastate business, which would still have its burdens to pay under the tax and which is just as much entitled to constitutional protection from discrimination as interstate commerce, as the dissents of Mr. Justice Brandeis and Mr. Justice Black, cited above, in particular have pointed out."

So it will be seen that this Circuit Court of Appeals has applied the principle that intrastate business is entitled to the same protection as interstate business and that discrimination against either is equally repugnant to the equal protection clause of the 14th Amendment to the Federal Constitution.

THE EQUAL PROTECTION CLAUSE APPLIES TO RETAILERS IN INTRASTATE COMMERCE AS WELL AS TO RETAILERS IN INTERSTATE COMMERCE.

(e) In the rules stated, *supra*, legislation which favors intrastate commerce over interstate commerce violates the

equal protection clause of the 14th Amendment. In the case at bar we have a case where interstate commerce is favored over intrastate commerce.

In *Gwin et al v. Henneford*, *supra*, Mr. Justice Black in a dissenting opinion, said I. c. 329, 332, 335.

"Equality is the theme that runs through all the sections of the statue of the State of Washington here considered. The statute imposes a general, non-discriminatory tax measured by gross receipts—upon all businesses operating in that State. The intended equality of the statute will become inequality by the judgment of this Court here, because appellant and all other businesses in Washington that receive income for selling Washington products in that and other States, are exempted from the tax. Appellant is exempted from past, present and future payments of this tax. Not so, however, as to past, present, or future payments by Washington businesses selling only to citizens of that state. They must bear the entire burden of the tax. Thus the judgment here, framed to prevent conjectured future, possible—not present and actual—discrimination against interstate commerce, makes of this statute with equality as its theme, an instrument of discrimination against Washington intrastate businesses. Appellant, a Washington agent or broker selling Washington products in that State and elsewhere, can now do so freed from this business tax. Washington agents and brokers selling the same products to Washington citizens (and all other local businesses) must pay, Washington's intra-state commerce thus will "pay its way;" interstate commerce need not."

"A State's taxes are not discriminatory if the State treats those engaged in interstate and intra-state business with equality and justice."

Also in *Ozark Pipe Line Corporation v. Monier et al*, 266 U. S. 555, 69 L. Ed. 439, 45 S. Ct. 184, a tax upon the

privilege to do business in the State of Missouri was before the court. The Pipe Line Company did both intrastate and interstate business. This court held that the tax could not be imposed. However, Mr. Justice Brandeis in a dissenting opinion announced the rule similar to that of Mr. Justice Black in the case of *Gwin, White & Price et al v. Henneford*, supra, and said at l. c. 187.

“If the tax is held void, the statute will, in fact, discriminate against intrastate commerce for the tax is confessedly valid as applied to all corporations which do not engage exclusively in interstate commerce.”

The above dissents of Mr. Justice Black and Mr. Justice Brandeis support petitioners position that if the retailer who engages in retail sales transactions of interstate commerce is exempt under the act, then retailers who engage in sales in retail sales transactions of intrastate commerce are discriminated against.

Such a construction would mean that all retailers making sales transactions in interstate commerce which do a vast amount of business in the state, will escape completely from the provisions of the Retail Sales Tax Act and they will have a 2% margin over retailers engaged exclusively in intrastate retail sales transactions.

The Missouri Supreme Court had before it the case of *State v. Distilling Company*, 139 S. W. 453, 236 Mo. 219. In this case the court in speaking of discriminatory legislation referred to a statement of the Supreme Court of the United States in the case of *Scott v. Donald*, 165 U. S. 98, wherein the court said l. c. 315.

“The Supreme Court of the United States, in the case of *Scott v. Donald*, 165 U. S. 98 has expressed the same views. This case involved the constitutionality

of the law known as the "South Carolina Dispensary Law." In discussing the application of the Wilson Act to that law, the court, on page 100, said: "The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. *But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful.*" (Emphasis ours.)

Applying this principle here, the Missouri Legislature has attempted to discriminate between interstate and domestic commerce which under this rule the Legislature cannot do.

THE CLASSIFICATION OF SALES AT RETAIL IN THE SALES TRANSACTIONS OF INTERSTATE COMMERCE IS NOT REASONABLE.

(f) The only reason that the Missouri Legislature could have had for exempting sales at retail in sales transactions of interstate commerce was that the transactions were in interstate commerce, even though commerce is not unconstitutionally burdened by the tax.

Petitioner submits that this is not a reasonable classification. In *Louisville Gas & Electric Company v. Coleman*, 277 U. S. 32, 72 L. Ed. 770, 48 Sup. Ct. 423, this court held that it is not bound by highest state court's characterization of state tax, as respects its effect under the equal protection clause and held that a statute of Kentucky which

imposed a tax on mortgages which do not mature in five years was an arbitrary and unreasonable classification of such mortgages and void under the equal protection clause. Mr. Justice Sutherland in delivering the opinion and speaking of the equal protection clause said l. c. 425.

"It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility provided always that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

"But classification good for one purpose may be bad for another; and it does not follow that, because the state may classify for the purpose of proportioning the tax it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt.

"Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property."

In *Colgate v. Harvey*, 296 U. S. 404, 56 Sup. Ct. 252, 260, 80 L. Ed. 299, 102 A. L. R. 54, this court had before it an

income tax act of the State of Vermont. Mr. Justice Sutherland delivered the opinion and in speaking of the statute as here applied said l. c. 260.

"The statute, as here applied, says that if a citizen resident of Vermont loan his money at 5 per cent. or less in another state, he must pay a tax upon the income; but if he loan money in Vermont at the same rate, no tax whatever shall be imposed. The power to tax income here asserted by Vermont is, in the final analysis, the power to tax so heavily as to preclude loans outside the state altogether. It reasonably is not open to doubt that the discriminatory tax here imposed abridges the privilege of a citizen of the United States to loan his money and make contracts with respect thereto in any part of the United States."

This case was overruled in *Madden v. Commonwealth of Kentucky et al* 309 U. S. 83, 60 Sup Ct. 406, however Mr. Justice Roberts in a dissent adhered to the views expressed in *Colgate v. Harvey, supra*.

II.

STAGE IN PROCEEDINGS IN THE COURT OF FIRST INSTANCE AND APPELLATE COURT AT WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

The petitioner in the trial court took the position that the exemption section 11409, Laws of Missouri 1941, page 702, here under consideration, was not a blanket exemption to all sales at retail in sales transactions of interstate commerce, but only exempted such sales transactions as the State of Missouri is prohibited from taxing under the Federal Constitution, contending that to construe said section as a blanket exemption of such sales from the tax

would be in violation of the equal protection clause to the Federal Constitution, because it would favor retailers making sales involving interstate retail sales transactions over retailers making retail sales only in intrastate transactions.

The unconstitutionality of the exemption section if construed as a blanket exemption was not raised in the pleadings in the trial court because petitioner at that time did not anticipate the court would construe it as a blanket exemption of all retail sales transactions in interstate commerce. The trial court in its memorandum (R. 57-61) held that it was not a blanket exemption and it was therefore unnecessary at that time to pass on the constitutionality of this section with respect to the equal protection clause of the 14th Amendment to the Federal Constitution. When the case was presented to the Missouri Supreme Court, the petitioner took the same position as to the construction which should be placed on said section 11409 as he did in the trial court. The portion of the opinion of the Missouri Supreme Court which petitioner relies on as sustaining his claim that that court passed on the constitutionality of said section is as follows (R. folio 87-88):

“The strict construction of the exemption section should not force the conclusion that the legislature intended other than that which it expressed in plain language, if the exemption as expressed in plain language is reasonable. The legislature did not express an intention that only retail sales in interstate commerce transactions which infringe the Commerce Clause should be exempted, and to so construe the section would greatly limit the embrace of the exemption.

“It must be conceded that the Sales Tax Act, if applicable to the sales in controversy, does not aim at, or discriminate against interstate commerce, and imposes the same burden upon the sales in controversy

as is imposed upon sales in intrastate commerce. To construe the exemption section to include sales of tangible personal property in which the transfer of ownership, or title to, the property occurs after the property has come to its destination in this state, would exempt *sales at retail* in the state with resultant loss of revenue, although the personalty so sold, being at the end of its journey within Missouri was consequently receiving the protection of the state's laws. And a construction of the exemption section which would exempt sales in interstate commerce which the state may otherwise tax—the purchasers of goods from sellers in intrastate commerce being required to pay the sales tax, and purchasers of sales in interstate commerce (otherwise taxable) not being obliged to pay—would place sellers in intrastate commerce in a position of competitive disadvantage. Of such a tax, although imposed upon a taxable event an integral part of a transaction of interstate commerce, it is now written that the burden of such a tax upon interstate commerce is merely incidental or consequential. However, we have found it no where written that such a tax does not burden interstate commerce. We may assert that there are reasonable men who believe such a tax subversive to the freedom of commercial intercourse among the states, tending to deprive purchasers and customers of one nation of the free enjoyment of the markets of the nation. We are herein interested in the latter view only insofar as it may tend to justify the exemption expressed by plain language in the section as a reasonable one.

“If it was the intention of the legislature to exempt, from the provisions of the Sales Tax Act, retail sales in the transactions of interstate commerce, since such exemption is reasonable, it cannot be successfully urged that the application of the exemption to the sales in controversy is invalid because apparently unjust in that it would place sellers in intrastate commerce in a position of competitive disadvantage.”

From the language expressed in the opinion as quoted above, it will be seen that the Missouri Supreme Court considered the section from the standpoint of whether or not the classification between interstate and intrastate commerce was reasonable. It will be noted that the court in this opinion wherein it discussed the rule of strict construction as to the application of the exemption section held that the application of such a rule "should not force the conclusion that the legislature intended other than that which it expressed in plain language" if the classification was reasonable. It will also be noted that the court in the opinion made the statement that "it must be conceded that the Sales Tax Act, if applicable to the sales in controversy, (i. e. if not exempted by Section 11409) does not aim at, or discriminate against interstate commerce, and imposes the same burden as it imposed upon sales in intrastate commerce." The court also stated in the opinion (R. 87) to the effect that there are reasonable men who believe "such a tax subversive to the freedom of commercial intercourse among the states, tending to deprive purchasers and customers of one nation of the free enjoyment of the markets of the nation" and said:

"We are herein interested in the latter view (that it is subversive to the freedom of commercial intercourse among the states, tending to deprive purchasers and customers of one nation of the free enjoyment of the markets of the nation) only insofar as it may tend to justify the exemption expressed by plain language in the section as a reasonable one." (Insert ours)

From this language, respondent submits that it further appears that the Missouri Supreme Court considered this exemption section from the standpoint of it being a reason-

able classification. In other words, whether or not it complied with the provisions of the equal protection clause of the 14th Amendment to the Federal Constitution. Then following the foregoing statement, (R. 88) the court used this language which the petitioner contends that the court definitely ruled that the exemption section complied with the provisions of the equal protection clause of the 14th Amendment to the Federal Constitution when it said:

“If it was the intention of the legislature to exempt, from the provisions of the Sales Tax Act, retail sales in the transactions of interstate commerce, *since such exemption is reasonable*, it cannot be successfully urged that the application of the exemption to the sales in controversy is invalid because apparently unjust in that it would place sellers in intrastate commerce in a position of competitive disadvantage.”
(*Emphasis ours*)

By this language, the Missouri Supreme Court definitely held that the exemption section is reasonable and that it could not be urged that the application of the exemption section to the sales in controversy is invalid, that is, that it violates the equal protection clause of the 14th Amendment to the Federal Constitution, because it is apparently unjust in that it would place sellers in interstate commerce in a position of competitive disadvantage.

Therefore, it is the contention of the petitioner that the Missouri Supreme Court, irrespective of whether the validity of the exemption was attacked in the pleading, by the foregoing language, considered and passed on the constitutionality of said exemption section 11409 as it applies to the equal protection clause of the 14th Amendment to the Federal Constitution.

The petitioner submits that this court may take jurisdiction in such circumstances and we are supported by the rule announced by this court in the case of *Home Insurance Company et al. v. Dick et al* 281 U. S. 397, 74 L. Ed. 926, 74 A. L. R. 701, 50 S. Ct. 338 at l. c. 341 in which the court said:

“That the federal questions were not raised in the trial court is immaterial. For the Court of Civil Appeals and the Supreme Court of the State considered the questions as properly raised in the appellate proceedings, and passed on them adversely to the federal claim.” (citing cases)

Since the Missouri Supreme Court actually entertained and decided the federal question (R. folio 87-88) respondent submits that this court has jurisdiction to decide this issue.

Respondent also submits that since the trial court ruled that said section was not a blanket exemption and was therefore unnecessary to pass on the constitutionality of the section (R. 57-61) and the Missouri Supreme Court ruled that it was a blanket exemption (R. folio 90) and the petitioner having raised the validity of the exemption so construed in his motion for rehearing, (R. 95-96) then the exception to the general rule announced in the case of *Herndon v. State of Georgia* 295 U. S. 441, 55 S. Ct. 794, 795, could be applied here. The court in that case stated the general rule and the exception to the general rule in the following language:

“The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.” (citing cases)

"Petitioner, however, contends that the present case falls within an exception to the rule namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." (cases cited)

Petitioner also calls the court's attention to the dissenting opinion in the case of *Herndon v. State of Georgia*, supra, written by Mr. Justice Cardozo and concurred in by Mr. Justice Brandeis and Mr. Justice Stone, in which the rule is broadened. At l. c. 799 the court said:

"Here is an unequivocal rejection of the test of clear and present danger, yet a denial also of responsibility without boundaries in time. True, in this rejection, the court disclaimed a willingness to pass upon the question as one of constitutional law, assigning as a reason that no appeal to the Constitution had been made upon the trial or then considered by the judge. *Brown v. State*, 114 Ga. 60, 39 S. E. 873, *Loftin v. Southern Security Co.*, 162 Ga. 730, 134 S. E. 760; *Dunaway v. Gore*, 164 Ga. 219, 230, 138 S. E. 213. Such a rule of state practice may have the effect of attaching a corresponding limitation to the jurisdiction of this court where fault can fairly be imputed to an appellant for the omission to present the question sooner. *Erie R. Co. v. Purdy*, 184 U. S. 148, 22 S. Ct. 605, 46 L. Ed. 847; *Louisville & Nashville R. C. v. Woodford*, 234 U. S. 46, 51, 34 S. Ct. 739, 58 L. Ed. 1202. No such consequence can follow where the ruling of the trial judge has put the constitution out of the case and made an appeal to its provisions impertinent and futile. Cf. *Missouri v. Gehner*, supra; *Rogers v. Alabama*, 192 U. S. 226, 230, 24 S. Ct. 257, 48 L. Ed. 417. In such

circumstances, the power does not reside in a state by any rule of local practice to restrict the jurisdiction of this court in the determination of a constitutional question brought into the case thereafter. *Davis v. Wechsler*, 263 U. S. 22, 24, 44 S. Ct. 13, 68 L. Ed. 143. If the rejection of the test of clear and present danger was a denial of fundamental liberties, the path is clear for us to say so."

Under the foregoing authorities the petitioner respectfully submits that this cause is properly here for petition for Writ of Certiorari.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such end a writ of certiorari should be granted, and this Court should review the decision of the Supreme Court of Missouri, and finally reverse it.

ROY McKITTRICK,
Attorney-General,

TYRE W. BURTON,

J. W. THURMAN,

D. A. THOMPSON,

WM. G. MARBURY,

Counsel for Petitioner.

